LEE NGAN HOO v. INSP SARAWANAN PANRENGAM & ORS

HIGH COURT MALAYA, KUALA LUMPUR
LEONG WAI HONG JC
[WRIT SUMMON NO: WA-21NCvC-54-07-2023]
21 JUNE 2024

Abstract – *In an application for discontinuing a suit with liberty to file afresh, pursuant to the Rules of Court 2012, subject to the terms befitting the facts and circumstances surrounding the said application, Malaysian courts are empowered to grant the said application with or without the liberty to file afresh. One of such circumstances when the said application may be allowed without liberty to file afresh is when the suit has already reached the advanced stage but the applicant did not provide any cogent reason for the discontinuance.*

CIVIL PROCEDURE: *Action – Discontinuance of – Application by solicitor representing party to discontinue suit with liberty to file afresh – Whether relevant documents for preparation of trial submitted – Solicitors failed to prepare and file any bundle of documents and witness statements on first date of trial despite being directed to do so by court – Whether reason proffered by solicitor cogent – Whether court empowered to disallow application to discontinue suit with liberty to file afresh in toto – Whether fresh suit would be time-barred under s. 2 of Public Authorities Protection Act 1948*

The plaintiff was the mother of a remanded person ('son') who died on 3 March 2021 while being remanded in the Kuala Kubu Bharu Satellite Prison. The first defendant was the investigating officer while the rest of the defendants were his superiors. On 18 July 2023, the plaintiff filed a suit against the first defendant for negligence, whereas against the other defendants for vicarious liability ('suit'). The trial for the said suit was set from 6 Mei 2024 until 9 Mei 2024 and from 25 November 2024 until 28 November 2024 ('trial'). On 3 Mei 2024, plaintiff's solicitor ('solicitor'), on his own accord, filed a notice of application for the discontinuance of the suit with liberty to file afresh under O. 21 r. 3 of the Rules of Court 2012 ('ROC'), on the ground that the plaintiff had not given the solicitor documents for him to do the trial ('application'). The application was then heard urgently by the court on 6 Mei 2024. From the said hearing, it was found that, among others, despite on 23 November 2023 the court had already given directions to the parties to file all necessary documents and witness statements; (i) as of 6 Mei 2024, the solicitor had not prepared and filed any bundle of documents or witness statements of the plaintiff for the trial; (ii) the supporting affidavit for the application, which only consisted of

a bare affidavit without any documents exhibited, was not affirmed by the plaintiff but by the solicitors themselves; and (iii) the defendants had already filed their bundle of documents and witness statements for the trial on 29 March 2024. The primary issue that arose in the application was whether the court was empowered to allow the application but without the liberty to file afresh, on the ground as submitted by the solicitor.

Held (allowing application):

(1) The reason given by the solicitor for the application with the liberty to file afresh was not cogent at all. The solicitors had done nothing to prepare for the trial, from 23 November 2023 until 6 May 2024, although he was acting for the plaintiff in the suit. The liberty to file afresh would not serve any purpose as any fresh suit would be time-barred because 36 months had passed since the death of the son, upon which the alleged cause of action was founded. Hence the application was allowed but with no liberty to file afresh. (paras 30, 31 & 33)

(2) If the plaintiff still wished to proceed with the suit, considering the time limitation as mentioned under s. 2 of the Public Authorities Protection Act 1948, the correct application would not be to ask for the discontinuance of the suit with the liberty to file afresh, but to ask to proceed with the trial. (paras 31 & 35)

Case(s) referred to:

Alias Ismail v. Hairuddin Mohamad & Anor [1997] 4 CLJ 669 CA ***(refd)***

Dilantha Ranjula Bandara Malagamuwa v. Adm Ventures (M) Sdn Bhd & Ors And Other Cases [2018] CLJU 1135; [2018] 1 LNS 1135 HC ***(refd)***

Fox v. Star Newspaper Co [1898] 1 QB 636 ***(refd)***

Hanhyo Sdn Bhd v. Marplan Sdn Bhd & Ors [1991] 3 CLJ 1783; [1991] 2 CLJ (Rep) 684 HC ***(refd)***

Ji Zhan Capital Sdn Bhd v. Chua & Chew Sdn Bhd [2020] 10 CLJ 670 HC ***(refd)***

JPK (M) Sdn Bhd v. Sunny Tech (M) Sdn Bhd & Ors [2018] CLJU 89; [2018] 1 LNS 89 HC ***(refd)***

Layan Bujang & Ors v. Naim Land Sdn Bhd & Ors [2016] CLJU 918; [2016] 1 LNS 918 HC ***(refd)***

Majlis Peguam Malaysia & Ors v. Raja Segaran S Krishnan [2002] 3 CLJ 370 CA ***(refd)***

Mega Crystal Network Sdn Bhd v. Yayasan Selangor & Ors [2020] MLJU 133 ***(refd)***

Newlake Development Sdn Bhd v. Zenith Delight Sdn Bhd [2017] CLJU 527; [2017] 1 LNS 527 CA ***(refd)***

Overseas Union Finance Ltd v. Lim Joo Chong [1971] CLJU 101; [1971] 1 LNS 101 HC ***(refd)***

Prof Dato' Dr Rahmat Mohamad v. Shahizad Sulaiman [2024] 4 CLJ 302 HC ***(refd)***

Raub Oil Mill Sdn Bhd v. Dato' Sri Andrew Kam Tai Yeow [2019] CLJU 760; [2019] 1 LNS 760 HC ***(refd)***

Supramaniam Govindasamy v. Ravi Govindasamy & Anor [2023] CLJU 1640; [2023] 1 LNS 1640 HC ***(refd)***

Legislation referred to:
Public Authorities Protection Act 1948, s. 2
Rules of Court 2012, O. 21 rr. 2(1), 3(1)

Other source(s) referred to:
Malaysian Civil Procedure, vol 1 2021 edn, Sweet & Maxwell, 21/3/5

For the plaintiff - Nik Ahmed Asraf Nik Othman; M/s Lee & Partners
For the defendants - Siti Syakimah Ibrahim & Abdul Hakim Abdul Keram; SFC

Reported by Syamim Ariffin

JUDGMENT
(Encl. 27)

Introduction

[1] This is a tragic case. The plaintiff is the mother of a son who had died while under remand in the Kuala Kubu Bharu Satellite Prison on 3 March 2021. On 18 July 2023, she filed a suit at the High Court against the investigating officer for negligence, breach of duty and omission of duty; his superiors and the Malaysian Government for vicarious liability.

[2] I fixed the trial for eight days commencing on 6 May 2024 to 9 May 2024 and from 25 November 2024 to 28 November 2024.

[3] However, on 3 May 2024 solicitors for the plaintiff filed a notice of application in encl. 27 for leave to discontinue the plaintiff's suit with liberty to file afresh under O. 21 r. 3 of the Rules of Court 2012. ("ROC"). ("application for leave to discontinue").

[4] The supporting affidavit dated 3 May 2024 was affirmed not by the plaintiff but by a solicitor from the firm of solicitors acting for the plaintiff. The reason given was that allegedly the plaintiff has failed to give documents to them to do the trial. I find this reason flimsy for reasons I will articulate below.

[5] As the application for leave to discontinue was only filed on 3 May 2024, just three days before the eight-day trial commenced on 6 May 2024, I heard the application for leave to discontinue urgently on 6 May 2024.

[6] It was obvious the counsel for the plaintiff did not prepare for trial for reasons best known to him:

(i) I had way back on 23 November 2023 given directions to file all necessary documents and witness statements for trial by 3 January 2024 and fixed trial for eight days on 6 May 2024 to 9 May 2024 and from 25 November 2024 to 28 November 2024;

(ii) as of 6 May 2024 which is the first day of trial solicitors for the plaintiff have yet to file any bundle of documents or witness statements of the plaintiff for trial;

(iii) the statement of claim contained a detailed account of the facts and claim and it is inconceivable that the witness statement of the plaintiff was not even prepared and filed;

(iv) the affidavit in support of the application for leave to discontinue dated 3 May 2024 (encl. 28) was not affirmed by the plaintiff but by the solicitor. It was a bare affidavit without any documents exhibited. It merely said the plaintiff had failed to give them documents to prepare for trial; and

(v) the defendants have filed their bundle of documents and six witness statements for trial on 29 March 2024.

[7] On 6 May 2024, after hearing submissions, I had allowed the plaintiff discontinuance of her suit but without liberty to file afresh with costs of RM5,000 to the defendants.

[8] The court sympathises with the plaintiff's predicament but ordered no liberty to file afresh as learned counsel for the defendants objected to liberty to file afresh as a new suit is now barred by limitation.

[9] The plaintiff has appealed to the Court of Appeal on 4 June 2024 against the part of my order which had ordered no liberty to file afresh. These are my grounds of judgment.

The Law On Discontinuance Of Action Requiring Leave of Court Under O. 21 r. 3 Of The ROC

[10] The law on the discontinuance of a suit by a plaintiff is found in O. 21 of the ROC. Order 21 r. 2(1) of the ROC allows the discontinuance of an action by a plaintiff without the leave of court if the notice of discontinuance is filed not later than 14 days after the service of the defence on the plaintiff. (See *Newlake Development Sdn Bhd v. Zenith Delight Sdn Bhd* [2017] CLJU 527; [2017] 1 LNS 527; [2017] MLJU 671 CA and *Prof Dato' Dr Rahmat Mohamad v. Shahizad Sulaiman* [2024] 4 CLJ 302 HC).

[11] Order 21 r. 2 of the ROC reads as follows:

> Discontinuance of action without leave (O. 21 r. 2)
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> (2) **The plaintiff in an action begun by writ may, without the leave of the Court, discontinue the action** or withdraw any particular claim made by him therein, as against any or all of the defendants **at any time not later than fourteen days after the service of the defence on him** or, if there are two or more defendants, of the defence last served, by serving a notice in Form 32 to that effect on the defendant concerned. (emphasis added)

[12] The law on discontinuance of an action requiring leave of court under O. 21 r. 3(1) of the ROC 2012 is settled law. A

[13] The two decisions of the Court of Appeal in *Majlis Peguam Malaysia & Ors v. Raja Segaran S Krishnan* [2002] 3 CLJ 370 per Gopal Sri Ram JCA and in *Newlake Development Sdn Bhd v. Zenith Delight Sdn Bhd* [2017] CLJU 527; [2017] 1 LNS 527; [2017] MLJU 671 are the leading cases on the law on discontinuance of an action requiring leave of court. B

[14] In *Newlake Development Sdn Bhd v. Zenith Delight Sdn Bhd* [2017] CLJU 527; [2017] 1 LNS 527; [2017] MLJU 671 CA Zabariah Mohd Yusof JCA said: C

> [21] In an action begun by writ, a plaintiff may, without leave of the court, discontinue the action not later than 14 days after service of the defence (see O. 21 r. 2(1) of the Rules of Court 2012). *Once the 14 days for service of the defence has passed, discontinuance may be done only with leave. The court in granting such leave may impose such terms as it thinks just, inter alia, in respect of costs and in respect of bringing a further subsequent actions* (see O. 21 r. 3(1) of the Rules of Court 2012). D
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> [22] The Plaintiff herein applied to discontinue the Suit under O. 21 r. 3(1) of the Rules of Court 2012. In the exercise of its discretion when granting leave, the court has a wide discretion, based on judicial principles. Practical considerations do come into play when exercising the discretion. … E
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> [23] *Before granting the order for discontinuance of an action, the court must be satisfied that:*
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> i) if a defendant is dominus litis, the general rule is to refuse leave to discontinue (see *Overseas Union Finance Ltd v. Lim Joo Chong* [1971] 2 MLJ 124); F
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> ii) the case is not at an advanced stage; if so, care must be taken not to permit discontinuance. What constitutes an advanced stage depends on the facts and circumstances of the case (see *Fox v. Star Newspaper Company* [1898] 1 QB 636);
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> iii) the plaintiff may have gained an interim interlocutory advantage between the date of issue of the writ and the point of time he seeks to discontinue (*O'Neal v. Mann* [2000] FCA 1680); G
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> iv) there is no miscarriage of justice occasioned by its refusal to permit the discontinuance;
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> v) it will not prejudice the opponent to the application or take away from him any advantage to which he is fairly and reasonably entitled. H
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> [24] In summary, the discretion to allow the application to discontinue an action and the discretion to impose the terms accompanying it, depends very much on the facts and circumstances of each case. (emphasis added)] I

[15] Even if the application by the plaintiff is for a discontinuance of the suit with liberty to file afresh, the court is empowered to grant the discontinuance but with no liberty to file afresh under the new Rules of Court 2012. Indian cases which held that when the court has declined to grant leave to file a fresh suit, the trial court ought to have dismissed the application in toto as the court would be acting without jurisdiction in dividing the application into two parts is not the law here. (See *Newlake Development Sdn Bhd v. Zenith Delight Sdn Bhd* [2017] CLJU 527; [2017] 1 LNS 527; [2017] MLJU 671 CA at (35 to 37) per Zabariah Mohd Yusof JCA).

[16] This is what Zabariah Mohd Yusof JCA said:

> [35] In granting the application by the Plaintiff herein, whether the court could in the circumstances allow the application in part *ie*, allowed the discontinuance but with no liberty to file afresh. The appellant cited Indian authorities … The case went on appeal and it was argued on behalf of the petitioner that the trial court erred in partly allowing the application to withdraw without liberty to file afresh on the same cause of action. It was argued on behalf of the petitioner that the trial court could have dismissed the application entirely and the petitioner would have proceeded with the suit. The petitioner relied on reported decisions of *Marudachala Nadar v. Chinna Muthu Nadar* AIR 1932 Madras 155, as well as *T.W. Ranganathan v. T.K. Subramaniam*, and submitted that the impugned order of the trial court was in violation of O. 23 r. 1(3) CPC as the court cannot split the order to cause serious prejudice to the plaintiff. ... It was subsequently held that:
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> > 12. *An application to withdraw a suit with liberty to file afresh must either be allowed or refused in toto. It is not open to the Court to grant a prayer for withdrawal and refuse the leave. If liberty is refused, the suit should not be dismissed, but must be retained in the file for trial/continuation of trial. If an application is made for withdrawal of the suit with liberty to file a fresh suit, it is not open to the Court to grant only permission for withdrawal, without liberty to file afresh suit. If the Court simply allows withdrawal but refuses liberty, the Court would be acting without jurisdiction* in dividing the Petition into two parts. It is to be noted that the application under the Order 23 rule 1 (3) of C.P.C. is indivisible whole. The Trial Court was not right in separating the prayer for withdrawal and the leave to file a fresh suit. *When the Court has declined to grant leave to file a fresh suit, the Trial Court ought to have dismissed the application in toto.*
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> [36] *We are not in agreement with the decision of the abovementioned Indian cases in this respect,* as we are not deplete of local authorities that have established that the courts generally has wide discretion in granting an application to discontinue an action subject to terms that befit the facts and circumstances of the case. Hence, even if the application by the Plaintiff is for a discontinuance of the Suit with liberty to file afresh, the Court may very well be empowered to grant the discontinuance but with

no liberty to file afresh. What is pertinent is the prejudice suffered by imposing such conditions to the Plaintiff who is now left without any remedy. This issue will be addressed in the later part of this judgment.

[37] In considering this appeal, we are mindful of the fact *that under the new Rules of Court 2012, the Court plays a proactive role in moving the pace for litigation.* The Courts no longer leave it to the litigants to decide the same. (emphasis added)

[17] The court will normally allow the plaintiff to discontinue if he wants to, provided no injustice will be caused to the defendant. This is because it is not desirable that a plaintiff should be compelled to litigate against his will. (See *Hanhyo Sdn Bhd v. Marplan Sdn Bhd & Ors* [1991] 3 CLJ 1783; [1991] 2 CLJ (Rep) 684; [1992] 1 MLJ 51 per Lim Beng Choon J).

[18] As to when a court will compel a plaintiff to litigate against his will, this has been explained in *Hanhyo Sdn Bhd v. Marplan Sdn Bhd & Ors* [1991] 3 CLJ 1783; [1991] 2 CLJ (Rep) 684; [1992] 1 MLJ 51 by Lim Beng Choon J and reproduced in *Supramaniam Govindasamy v. Ravi Govindasamy & Anor* [2023] CLJU 1640; [2023] 1 LNS 1640; [2023] MLJU 1844 HC by Azizan Md Arshad JC at para. 17 as follows:

[17] In *Hanhyo Sdn Bhd v. Marplan Sdn Bhd & Ors* [1992] 1 MLJ 51, the court, after analysing and considering the principles expressed by three cases related to the withdrawal or termination of the action, namely the cases of (i) *Costanho v. Brown & Root (UK) Ltd & Anor* [1981] AC 557, (ii) *Covell Mathews & Partners v. French Wools Ltd* [1977] 2 All ER 591, and (iii) *Oversea Union Finance Ltd v. Lim Joo Chong* [1971] 2 MLJ 124, held as follows:

> The principles that can be extracted from the aforementioned cases are that the court would not compel a Plaintiff to continue his action against a Defendant if he does not want to do so provided no injustice is cause to the Defendant. Injustice would be caused to the Defendant if:
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> (1) the discontinuance was made with ulterior motive to obtain a collateral advantage as in the case of *Costanho v. Brown & Root Ltd;*
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> (2) the discontinuance was not made bona fide by the Plaintiff but it was made in order to obtain an advantage to which he has no right to retain since he has ceased to be *dominis litis* as the defendant has perfectly good defence – see *Oversea Union Finance Ltd v. Lim Foo Chong*;
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> (3) by the discontinuance of the action the defendant would be deprived of an advantage which he has already gained in the litigation – see *Covell Matthews & Partners v. French Wools Ltd.*

(See also *Crestronics (M) Sdn Bhd lwn. Panasonic Manufacturing Malaysia Bhd* [2021] MLJU 2845)

[19] The principal reason for the requirement for leave is that once proceedings have reached a certain stage, the plaintiff, who has brought his adversary into court, shall not be able to escape by a side door and avoid the contest, since he is no longer *dominus litis* and it is for the judge to say whether the action shall be discontinued or not and upon what terms. (See *Malaysian Civil Procedure,* vol. 1 2021 edn Sweet & Maxwell at 21/3/4 and *Fox v. Star Newspaper Co* [1898] 1 QB 636 at 639, CA (Eng), per Chitty LJ; [1900] AC 19, HL).

[20] When the case has gone to an advanced stage, there must be cogent reasons for the court to grant discontinuance with liberty to file afresh (*Layan Bujang & Ors v. Naim Land Sdn Bhd & Ors* [2016] CLJU 918; [2016] 1 LNS 918). (See *Malaysian Civil Procedure,* vol. 1 2021 edn, Sweet & Maxwell at 21/3/5).

[21] What constitutes advanced stage may differ among judges. In *Ji Zhan Capital Sdn Bhd v. Chua & Chew Sdn Bhd* [2020] 10 CLJ 670; [2020] 6 AMR 709; [2020] MLJU 856, the court refused to grant liberty to file afresh after taking into consideration, *inter alia*, that the witness statement and all the necessary trial documents were filed. It was held that the plaintiff has seen all the defendant's cards, to grant liberty to file afresh would allow the plaintiff to make good of any earlier deficiency in his case by making fresh pleading. In *JPK (M) Sdn Bhd (dalam likuidasi mendakwa melalui Cheng & Co Corporation Recovery Sdn Bhd) v. Sunny Tech (M) Sdn Bhd & Ors* [2018] MLJU 94, the court allowed liberty to file afresh as the court took a different view and held that although all trial documents were filed and trial dates were fixed, it was not considered to be at an advanced stage since the trial had not even commenced, and there was nothing to show that the plaintiff had gained an advantage over the defendant. (See *Malaysian Civil Procedure* vol. 1 2021 edn, Sweet & Maxwell at 21/3/5).

[22] The court may refuse to grant liberty to file afresh if the plaintiff provides no reason for the discontinuance. This is usually coupled with other factors, such as, the proceedings is already at an advanced stage. See *Dilantha Ranjula Bandara Malagamuwa v. Adm Ventures (M) Sdn Bhd & Ors And Other Cases* [2018] CLJU 1135; [2018] 1 LNS 1135; [2018] AMEJ 1162; [2018] MLJU 1034; *Mega Crystal Network Sdn Bhd v. Yayasan Selangor & Ors* [2020] MLJU 133. (See also *Malaysian Civil Procedure,* vol. 1 2021 edn Sweet & Maxwell at 21/3/5).

[23] In *Raub Oil Mill Sdn Bhd v. Dato' Sri Andrew Kam Tai Yeow* [2019] CLJU 760; [2019] 1 LNS 760; [2019] 11 MLJ 471 HC Ong Chee Kwan JC said:

[27] In *Newlake Development Sdn Bhd v. Zenith Delight Sdn Bhd* [2017] MLJU 671, the Court of Appeal declined to follow the Indian cases holding that it is not open to the court to grant leave to discontinue without liberty to file a fresh suit if an application that is made is one for a discontinuance with liberty to file a fresh suit. The Indian cases held that when the court has declined to grant leave to discontinue, the court ought to dismiss the application to discontinue in toto.

[28] *Our Court of Appeal held that in an application under our O. 21 r. 3(1) of Rules, the court has wide discretion in granting an application to discontinue an action subject to terms that befit the facts and circumstances of the case.* The relevant passage of the judgment states:

> [36] *We are not in agreement with the decision of the abovementioned Indian cases in this respect,* as we are not depleted of local authorities that have established that the courts generally has wide discretion in granting an application to discontinue an action subject to terms that befit the facts and circumstances of the case. *Hence, even if the application by the plaintiff is for a discontinuance of the suit with liberty to file afresh, the court may very well be empowered to grant the discontinuance but with no liberty to file afresh.* What is pertinent is the prejudice suffered by imposing such conditions to the plaintiff who is now left without remedy. (emphasis added)

A Suggestion For The Way Forward

[24] "*Dominus litis*" is a Latin maxim that means "master of the suit". It refers to the principle that a party who initiates a legal action has control over the proceedings. (See *Ji Zhan Capital Sdn Bhd v. Chua & Chew Sdn Bhd* HC at (15 to 16)).

[25] Taking the cue from the jurisprudence propounded by the Court of Appeal in *Newlake Development Sdn Bhd v. Zenith Delight Sdn Bhd* [2017] CLJU 527; [2017] 1 LNS 527; [2017] MLJU 671 CA, we should revisit the common law principle that "Leave may be refused to a plaintiff to discontinue the action, if the plaintiff is not wholly *dominis litis* or if the defendant has by the proceedings obtained an advantage of which it does not seem just to deprive him." (See *Overseas Union Finance Ltd v. Lim Joo Chong* [1991] CLJU 101; [1991] 1 LNS 101; [1971] 2 MLJ 124 HC per Raja Azlan Shah J).

[26] This is because the starting principle must be that it is not desirable that a plaintiff should be compelled to litigate against his will. (See *Hanhyo Sdn Bhd v. Marplan Sdn Bhd & Ors* [1991] 3 CLJ 1783; [1991] 2 CLJ (Rep) 684; [1992] 1 MLJ 51 per Lim Beng Choon J).

[27] If the plaintiff wishes to discontinue his action and the court finds that the plaintiff is not wholly *dominis litis* or if the defendant has by the proceedings obtained an advantage of which it does not seem just to deprive him, the court should not force the plaintiff to litigate against his wishes but should allow him to discontinue but without liberty to file afresh.

[28] We can now do that, *ie*, impose a term 'without liberty to file afresh', contrary to the position taken by the Indian cases, because as pointed out by the Court of Appeal in *Newlake Development Sdn Bhd v. Zenith Delight Sdn Bhd* [2017] CLJU 527; [2017] 1 LNS 527; [2017] MLJU 671 CA at [37], Malaysian courts can now impose terms on discontinuance as 'under the new Rules of Court 2012, the court plays a proactive role in moving the pace for litigation. The courts no longer leave it to the litigants to decide the same.'

[29] It makes sense to depart from the common law position mentioned earlier that compels the plaintiff to proceed with his suit if the plaintiff is no longer *dominus litis*, now that under our new ROC 2012 we can allow a discontinuance but without liberty to file afresh. This way we can avoid unnecessary wastage of precious judicial time and litigants can also save on legal fees.

Application To Facts

[30] In the case before me, I do not see the reason given by learned counsel for the plaintiff to ask for discontinuance of the suit with liberty to file afresh cogent at all. The counsel has not done anything at all to prepare for trial, from 23 November 2023 (the date I gave directions to file all necessary documents and witness statements for trial) to 6 May 2024 (the date of trial), although he acts for the plaintiff that is making the claim.

[31] He asked for discontinuance of the suit with liberty to file afresh. Given liberty to file afresh would serve no purpose as any fresh suit is time-barred as 36 months have passed since the death of the plaintiff's son on 3 March 2021 upon which is founded the alleged cause of action. (See s. 2 of the Public Authorities Protection Act 1948 and *Alias Ismail v. Hairuddin Mohamad & Anor* [1997] 4 CLJ 669).

[32] In *Alias Ismail v. Hairuddin Mohamad & Anor* [1997] 4 CLJ 669, Abdul Malek Ahmad JCA said:

> But *the merits of the matter were of no consequence to us since the only issue that stood out was the question of limitation.*
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> the learned Federal Counsel had reiterated that the appellant was governed by the limitation provision and was out of time. *He had referred to s. 2 of the Public Authorities Protection Act 1948* which states that where any suit, action, prosecution or other proceeding is commenced against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority, that suit, action, prosecution or proceeding *shall not lie or be instituted unless it is commenced within three years next after the act, neglect or default*

complained of. Further, s. 38 of the Government Proceedings Act 1956 provides that the Government, in any civil proceedings against it, may as a defence rely on any written law relating to the limitation of time in any proceedings against public authorities.

In the instant appeal, it is not disputed that the appellant had taken more than three years to file the action. The incident took place in 1987 but the suit was filed only in 1996, some nine years later. Even if we were to take the date he received the letter of approval to file the action, which should not be the case, the relevant date was 12 November 1991 and he would still be out of time.

The court has no discretion to set aside a defence of limitation.

(emphasis added)

Decision

[33] For the reasons above, I allow the discontinuance of the suit but without liberty to file afresh with costs of RM5,000 to the defendants.

Postscript

[34] I note that after my decision of 6 May 2024 a new firm of solicitors, Messrs Sim and Rahman has taken over on 4 June 2024 from Messrs Lee and Partners to act for the plaintiff and has also filed this appeal.

[35] If the plaintiff still wishes to proceed with her claim, then the correct application is not to ask for discontinuance of the suit with liberty to file afresh, as prayed for in encl. 27 before me, as such an order is worthless for the limitation reason I had given above. The application should be to proceed with the trial.

[36] Such an order was made by the Court of Appeal in *Newlake Development Sdn Bhd v. Zenith Delight Sdn Bhd* [2017] CLJU 527; [2017] 1 LNS 527; [2017] MLJU 671 where Zabariah Mohd Yusof JCA ordered "The case is remitted back to the High Court for further case management in preparation for full trial":

[55] There was nothing that was before the court to suggest that the discontinuance applied for by the Plaintiff had caused an injustice to the Defendant. In fact, the Plaintiff stands to be gravely prejudiced by the order of the learned JC.

[56] … On the facts and circumstances of the case and given that the case was filed 18 months from the decision of the striking out was made, *justice is best served if the case is allowed to remain for trial.* …

[57] … *Hence, discretion should have been to dismiss the application and direct the Suit to proceed to trial.*

[58] Therefore, the order of the learned JC is set aside. The case is

A remitted back to the High Court for further case management in preparation for full trial.

[59] Appeal is allowed with no order as to costs. (emphasis added)

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